

JEAN E. WILLIAMS, Acting Assistant Attorney General
SETH M. BARSKY, Chief
S. JAY GOVINDAN, Assistant Chief
MICHAEL R. EITEL, Senior Trial Attorney
KAITLYN POIRIER, Trial Attorney (TN Bar # 034394)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 307-6623
Facsimile: (202) 305-0275
Email: kaitlyn.poirier@usdoj.gov; michael.eitel@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL
DEFENSE CENTER, et al.,

Plaintiffs,

Case No.: 3:18-cv-00437-HZ

FEDERAL DEFENDANTS' NOTICE OF
SUPPLEMENTAL AUTHORITY

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Defendants,

and

CITY OF SALEM and MARION COUNTY,

Defendant-Intervenors.

Federal Defendants respectfully submit the United States District Court for the Central District of California's recent decision in *San Luis Obispo Coastkeeper, et al. v. Santa Maria Valley Water Conservation District, et al.*, Case No. CV-19-08696 (attached as Exhibit 1), as supplemental authority

in support of Federal Defendants' Brief in Opposition to Plaintiffs' Remedy Proposal (ECF 130). The decision is relevant to Federal Defendants' argument that Plaintiffs' proposed injunction actions 30 and 36—the deep drawdowns at Cougar and Lookout Point dams—violate the Flood Control Acts as they eliminate water in power storage, and thus preclude the congressionally-authorized power generation purpose, during the critical power production period. ECF 130 at 14-18.

In *San Luis Obispo Coastkeeper*, the plaintiffs alleged that the United States Bureau of Reclamation and a local water district were violating the Endangered Species Act (“ESA”) by managing and operating Twitchell Dam in California in a manner that resulted in the allegedly unlawful take of Southern California steelhead trout, an ESA-listed species. Exhibit 1 at 2. Plaintiffs sought an order requiring Reclamation and the water district to modify operations at Twitchell Dam to provide additional water for fish migration. *Id.* at 2-3. The court determined that if the authorizing statute (Public Law 774) did not give the defendants “discretion to operate Twitchell Dam as Plaintiffs seek to avoid take, then Defendants are not a proximate cause of the alleged take and Defendants cannot be liable under ESA § 9.” *Id.* at 9-10. In other words, the question before the court was whether Public Law 774 gave Reclamation and the local water district the discretion to provide the water releases from Twitchell Dam that the plaintiffs requested. *See id.* at 4, 13.

Public Law 774 authorized the Secretary of the Interior to construct Twitchell Dam “for irrigation and the conservation of water, flood control, and for other purposes . . . substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1952, entitled ‘Santa Maria project, Southern Pacific Basin, California’ [Report]. . . .” *Id.* at 11 (quoting Public Law 774). In turn, the Secretary of the Interior’s Report identified the following purposes for Twitchell Dam: water conservation, irrigation, flood control, and municipal and industrial water. *Id.* at 10-11. The Report stated “that these purposes will be achieved by retaining water behind Twitchell Dam and releasing it in a controlled manner so it will percolate into the underground

reservoir for later use.” *Id.* at 11. The Report also considered Twitchell Dam’s impact on the Southern California steelhead, but did not recommend using conserved water for the species’ benefit. *Id.* at 12-13.

The court applied the legal standard articulated in *Britt v. U.S. Army Corps of Engineers*, 769 F.2d 84 (2d Cir. 1985), and found that operating Twitchell Dam in the manner plaintiffs proposed is “so foreign to the original express purposes of Twitchell Dam as to be arbitrary and capricious” because it directly conflicts with the express water conservation purpose of Twitchell Dam outlined in Public Law 774. *Id.* at 14-15. This was true notwithstanding plaintiffs’ argument that Twitchell Dam will still operate “substantially in accordance with” the Report because only a small amount of water would be released under the proposed operations. *Id.* at 17. Therefore, the court held that the operations plaintiffs requested were not in defendants’ authority and defendants could not be held liable for take under ESA Section 9. *See id.* at 18-19.

The *San Luis Obispo Coastkeeper* decision is relevant to the present case as Congress similarly authorized the Corps to build, operate, and maintain the Willamette Valley Project “substantially in accordance with” a report—the Chief of Engineers’ Report contained in House Document (“HD”) 531. 1950 Flood Control Act, Pub. L. No. 81-516, 64 Stat. 163, 179 (1950). In turn, the Chief of Engineers’ Report makes clear that one of the purposes of Cougar and Lookout Point dams is power generation and these projects would have designated power storage “reserved exclusively for power generation” during the critical power production period, October through March. *See HD* 531 at Table IV-53; HD 531 Appendix J at 2239; HD 531 Appendix J at 2054. As in *San Luis Obispo Coastkeeper*, a straightforward application of the legal standard in *Britt* shows that Plaintiffs are seeking a remedy that would be “so foreign to the original purpose of the project” that its implementation would be unlawful. *See Britt*, 769 F.2d 84 at 89.

Dated: April 23, 2021

JEAN E. WILLIAMS, Acting Assistant Attorney General
SETH M. BARSKY, Section Chief
S. JAY GOVINDAN, Assistant Section Chief

/s/ Kaitlyn Poirier

KAITLYN POIRIER, Trial Attorney (TN Bar # 034394)
U.S. Department of Justice
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Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 307-6623
Fax: (202) 305-0275
Email: kaitlyn.poirier@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I certify that on April 23, 2021, the foregoing was electronically filed through the Court's electronic filing system, which will generate automatic service on all parties enrolled to receive such notice.

/s/ Kaitlyn Poirier

Kaitlyn Poirier
Trial Attorney, U.S. Department of Justice